No. 14372

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES SCHIFFMAN,

Appellant,

vs.

FRED T. WILKINSON, Warden, United States Penitentiary, McNeil Island, Washington,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

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INDEX

TABLE OF CASES CITED

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BRIEF OF APPELLEE

QUESTION PRESENTED BY THE APPEAL

Where a prisoner on conditional release committed an offense March 18, 1951, and received a second sentence therefor November 26, 1952, was the warrant for violation of his conditional release issued by the Parole Board May 2, 1952, four days prior

to the expiration of his maximum term on first sentence, within the time required by law, in view of the amendment of Title 18, U.S.C.A., Section 4164, added June 29, 1951, exempting parolee from supervision for 180 days prior to end of term?

STATEMENT OF PLEADINGS AND FACTS

Appellant, on March 15, 1954, filed his petition for writ of habeas corpus with the Clerk of the District Court (R. 1-6) and the writ thereon was issued on the same day (R. 6-7). The petition contends the detainer is invalid and illegal because it contravenes the present conditional release law. (R. 5)

To the Writ of Habeas Corpus returnable on April 1, 1954, appellee served and filed his answer and return to the writ (R. 8-12) and produced in court the body of the appellant at time of return and hearing, April 1, 1954, at which hearing the facts set forth below were adduced. (R. 14-19)

The District Court took the matter under advisement and thereafter denied the appellant's claim on the grounds and for the reasons stated in its memorandum decision rendered and filed April 1, 1954. (R. 12-13)

Findings of Fact and Conclusions of Law, consonant with the court's written Opinion, were entered

April 9, 1954 (R. 14-19), and based thereon an order denying appellant's petition and dismissing his action, discharging the writ and remanding appellant to the custody of the warden. (R. 20-21)

From the final order made April 9, 1954, the appellant has appealed. (R. 22-25, 32-36)

The facts material to a determination of appellant's right to discharge from present confinement, as disclosed in the record (R. 14-19, 25-31), may be summarized as follows:

On July 18, 1940, appellant was sentenced to a ten-year term of imprisonment by the United States District Court for the Northern Division of Texas, for violation of the Narcotic Act, which sentence began to be served on May 7, 1942, when appellant, pursuant thereto, was committed to the United States Penitentiary at Leavenworth, Kansas, after completion of an Illinois State sentence. He was released on conditional release from said federal institution on January 22, 1949. (R. 15)

Thereafter, on or about March 18, 1951, the appellant violated his conditional release by the commission of an overt act in furtherance of and to effect a conspiracy to violate the Narcotic Act, for which offense he was indicted on March 7, 1952. (R. 15-16, 25-27)

Appellant was arrested on March 7, 1952, on the charge for which he was indicted on said day, and thereafter on May 2, 1952, four days before his full term expiration date, the United States Board of Parole issued its warrant for his arrest as a conditional release violator, the warrant not being executed pending disposition of said charge. (R. 16)

Thereafter on November 26, 1952, on appellant's plea of guilty to the indictment filed against him (R. 25-27), he was sentenced by the United States District Court for the Southern Division of the Northern District of California to serve a term of three years imprisonment, (R. 28-30) pursuant to which he was received at McNeil Island on December 11, 1952. (R. 16)

By order entered January 23, 1953, the trial court reduced the three-year sentence to eighteen months (R. 30-31), and appellant was technically released therefrom on conditional release on February 6, 1954, on which date the parole warrant was executed and appellant was retained in custody of appellee as a conditional release violator on his original sentence for a ten-year term of imprisonment. (R. 16)

The District Court found the appellant was now lawfully committed for service within walls of the balance of his ten-year sentence; and with 1200 days

remaining to be served from February 6, 1954, a full term expiration date of May 20, 1957, and an allowance for statutory good time of 395 days, his reconditional release date, as computed by the institution would be April 20, 1956. (R. 17)

PERTINENT STATUTES

Prior to 1951 amendment, Act June 29, 1951, Section 4164, Title 18, U.S.C.A., covering the matter of conditional release insofar as relevant here, read:

> "A prisoner having served the term or terms for which he shall have been sentenced after June 29, 1932, less good time deductions, shall upon release be treated as if released on parole, and shall be subject to all provisions of law relating to the parole of United States prisoners until the expiration of the maximum term or terms for which he was sentenced. * * * June 25, 1948, C. 645, 62 Stat. 853."

Title 1, U.S.C.A., Section 109, covering the matter of repeal of statutes as affecting existing liabilities, provides:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have

> the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. July 30, 1947, C. 388, Sec. 1, 61 Stat. 633."

Title 18, U.S.C.A., Section 4205, regulating the retaking of parole violators under warrant, and the time to be served provides:

> "A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve. June 25, 1948, c. 645, 62 Stat. 854."

ARGUMENT

Appellant cannot well contend that he was under official restraint or serving his sentence on March 18, 1951, when he violated his conditional release by the commission of an offense of which he was later convicted.

The reasoning of the Supreme Court in *Anderson v. Corall*, 263 U.S. 193, does not lend support to the

contentions advanced by appellant in his brief. (Appellant's Brief, pages 1-3).

At page 196 of the *Corall* decision, the Court said:

> "Mere lapse of time without imprisonment *or other restraint contemplated by the law* does not constitute service of sentence. Escape from prison interrupts service, and the time elapsing between escape and retaking will not be taken into account or allowed as a part of the term. * * * The parole authorized by the statute does not suspend service or operate to shorten the term. While on parole the convict is bound to remain in the legal custody and under the control of the warden until the expiration of the term, less allowance, if any, for good conduct. While this is an amelioration of punishment, it is in legal effect imprisonment. The sentence and service are subject to the provision of § 6 that if the parole be terminated the prisoner shall serve the remainder of the sentence originally imposed without deduction for the time he was out on parole.
>
> "Corall's violation of the parole, evidenced by the Warden's warrant and his conviction, sentence to and confinement in the Joliet Penitentiary, interrupted his service under the sentence here in question, and was in legal effect on the same plane as an escape from the custody and control of the Warden. His status and rights were analagous to those of an escaped convict. * * * The term of his sentence had not expired in October, 1916, when at Chicago, he was convicted of another crime and sentenced to the Joliet Penitentiary. Then — *if not earlier* — he ceased to be in the legal custody and under control of the Warden of the Leavenworth Peni-

> tentiary, as required by Sec. 3 of the Act and the terms of parole authorized thereby." (Emphasis supplied)

And in *Zerbst v. Kidwell*, 304 U.S. 359, 361, where both conditional releases and paroles were involved, the Supreme Court repeated its understanding of when a conditional release or parole is violated and at what time service of sentence is interrupted and suspended.

> "When respondent committed a federal crime while on parole, for which he was arrested, convicted, sentenced and imprisoned, not only was his parole violated, but service of his original sentence was interrupted and suspended."

And on page 362, the Court continued:

> "Since service of the original sentence was interrupted by parole violation, the full term of that sentence has not been completed. *Just as respondent's own misconduct (parole violation) has prevented completion of the original sentence, so has it continued the authority of the Board over respondent until that sentence is completed and expires.* Discretionary authority in the Board to revoke a parole at any time before expiration of a parolee's sentence was provided and is necessary as a means of insuring the public that parole violators would be punished." (Emphasis supplied)

The foregoing decisions enunciate the principle that it is not the issuance of a warrant charging parole violation that tolls the expiration of service in

custody, but that it is the misbehavior of the parolee which establishes the termination of service. It is the offense committed and not the conviction that makes conduct a crime.

See, in this connection, *Klinker v. Squier*, 144 F. (2d) 491; *U. S. ex rel Anderson v. Anderson*, 8 F. Supp. 812, and *Zerbst v. Kidwell*, supra.

The case of *Edelson v. Sweet*, 197 F. (2d) 147, greatly relied upon by appellant, did not involve the violation of probation or parole, and consequently, no liability incurred through any violation. It was merely determined by a decision, dated June 6, 1952, that petitioner therein should be declared unconditionally released from parole supervision as of approximately December 16, 1951.

On the other hand, in *Moorehead v. Hunter*, 198 F. (2d) 52, the question as presented to the Court was whether the amended section applied to a violation of conditional release on which a parole violator's warrant was issued prior to the effective date of the Amendment of June 29, 1951. The appellant there contended he had less than 180 days to serve when the warrant was issued, and so could not be returned to the institution.

The Court, at page 53, held "that 1 U.S.C.A., Section 109, must be considered with relation to the

problem presented here the same as though old Section 4164 had been repealed and the present section had been passed in its stead."

Further, the Court, at page 54, said:

> "Section 109 provides that the repeal of a statute shall not release or extinguish any penalty or forfeiture or liability incurred thereunder, unless the repealing act shall so expressly provide and that the repealed act shall remain in force for the purpose of sustaining any proper action or prosecution for the enforcement of a penalty, forfeiture, or liability. In *United States v. Reisinger*, 128 U.S. 398, 9 S.Ct. 99, 32 L.Ed., 480, the Supreme Court discussed the meaning of the terms 'penalty, forfeiture or liability' and held that the term liability was intended to cover any form of punishment to which one subjects himself *by violating* the common laws of the country." (Emphasis ours)
>
> * * *
>
> "The Amendment of June 29, 1951, did not extinguish the *offense committed prior thereto* nor deprive the Board of Parole of jurisdiction under the warrant, which likewise had been issued prior to the effective date of the amendment, to hear and determine the case, make findings, and inflict penalties therefor." (Emphasis ours)
>
> * * *
>
> "We are here concerned with substantive rights and liabilities and not with procedural matters."

It is appellee's contention that the amendment to Section 4164, supra, was not intended as a meas-

ure of amnesty, but applied merely to duration of supervision.

This is the view expressed in *Shepherd v. U. S. Attorney General*, 108 F. Supp. 13, 14:

> "Moreover, the amendment merely shortened the time during which prisoners affected by the Act would be under supervision and did not amend or in anywise change the provisions of 18 U.S.C., § 4207 to the effect that 'If such order of parole be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced'."

The decision in *Wall v. Hunter*, 105 F. Supp. 54, does not disclose when the offense was committed for which the warrant was issued, and it consequently supports neither side of the question here involved.

We find nothing unusual in the decision in *Welch v. Hillis*, 53 F. Supp. 456, cited by appellant, with reference to reasonable time in which parole violator's warrant should be served. See in this connection, *Sapinski v. Humphrey*, 119 F. Supp. 822.

The case of *Hyche v. Reese*, 61 F. Supp. 646, decided July 20, 1945, and cited by appellant in his brief, appears to stand alone, and is out of line with the Supreme Court's expression on the points referred to by appellant.

The *Hyche* decision is based upon the provision in former Section 717 of Title 18, U.S.C.A. to the effect that "the warden * * * may issue his warrant to any officer hereinafter authorized to execute the same, for the retaking of such prisoner," which provision was obsolete at the time. In 1930, and prior to the *Hyche* decision, 723c of Title 18, U.S.C.A. was enacted giving to the Parole Board the exclusive authority to issue such warrants. The Supreme Court, in its decision of *Zerbst v. Kidwell*, May 16, 1938, gave no consideration to Section 717, which reposed in the statutes until the re-codification of 1948. See Section 4205, supra; *Zerbst v. Kidwell*, supra; and *U. S. ex rel Jacobs v. Barc*, 141 F. (2d) 480.

Appellee is not conceding that the 1200 days left for the appellant to serve within prison walls has expired or that the expiration of his sentence occurred prior to the execution of the parole violator's warrant taking him into custody on his original sentence.

Certainly, the case of *Clark v. Suprenant*, 94 F. (2d) 969, cited by appellant, is not in point.

The Parole Board is entrusted by Congress with authoritative and discretionary action in the matters of parole and conditional release. It is not the province of the District Courts to supervise or direct the

action of the Board. See *Tippitt v. Wood*, 140 F. (2d) 689; *Tippitt v. Squier*, 145 F. (2d) 211; *Hammerer v. Huff*, 110 F. (2d) 113.

CONCLUSION

For the foregoing reasons, it must be contended the decision below should be affirmed.

Respectfully submitted,

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